IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

Criminal No. 18-0093
ELECTRONICALLY FILED

v.

ANTHONY TAYLOR,

Defendant.

MEMORANDUM ORDER ON PRETRIAL MOTIONS (DOC. 47, DOC. 48, DOC. 49, DOC. 50, DOC. 51, DOC. 52, DOC. 53 AND DOC. 54)

Defendant Anthony Taylor ("Defendant") is charged by Superseding Indictment with: (1) distribution and possession with the intent to distribute fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C); (2) conspiracy to distribute 40 grams or more of fentanyl in violation of 21 U.S.C. § 846; (3) possession with the intent to distribute 40 grams or more of fentanyl in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(vi); (4) conspiracy to distribute 500 grams or more of cocaine in violation of 21 U.S.C. § 846; and (5) possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). (Doc. 39). Pending before the Court are multiple pretrial Motions filed on behalf of Defendant. The motions will be addressed *seriatim*.

I. Defendant's "Motion to Compel Disclosure of Plea Bargains, Preferential Treatment, and Promises to Government Witnesses with Citation of Authorities" (Doc. 47)

First is Defendant's "Motion to Compel Disclosure of Plea Bargains, Preferential Treatment, and Promises to Government Witnesses with Citation of Authorities." (Doc. 47). By way of this Motion, Defendant seeks the disclosure of all witnesses with whom the Government has entered into agreements with, or extended preferential treatment to, in return for their assistance or testimony in this case and/or other cases, as well as the nature and extent of the bargain, preferential treatment, or promises. (*Id.* at 2).

In response, the Government recognizes its obligation to provide this type of *Giglio* information to Defendant, and states its intention to comply fully with its obligation to do so, along with providing Defendant with Jencks Act material, on January 10, 2019, as required by this Court's Amended Pretrial Order. (Doc. 57 at 5).

On August 28, 2018, the Court entered an Amended Pretrial Order pursuant to which the Government is required to "provide defense counsel with copies of any *Brady/Giglio* impeachment materials not previously disclosed, and any evidence of defendant's uncharged conduct which it intends to introduce at the trial pursuant to Federal Rule of Evidence 404(b), on or before **January 10, 2019**." (Doc. 38) (emphasis in original). In light of the Court's preexisting Amended Pretrial Order, requiring the Government to provide Defendant with any *Brady/Giglio* evidence not previously disclosed by January 10, 2019, Defendant's "Motion to Compel Disclosure of Plea Bargains, Preferential Treatment, and Promises to Government Witnesses with Citation of Authorities," (Doc. 47), is denied as moot.

II. Defendant's "Motion for Disclosure of All Prior Testimony/Statements of Unindicted Co-Conspirators and/or Confidential Informants and for Disclosure of the Identity and Contact Information of the Same" (Doc. 48)

Second is Defendant's "Motion for Disclosure of All Prior Testimony/Statements of Unindicted Co-Conspirators and/or Confidential Informants and for Disclosure of the Identity and Contact Information of the Same." (Doc. 48). By way of this Motion, Defendant seeks disclosure of the identity and contact information of any and all unindicted co-conspirators and/or confidential informants as well as any prior statements and/or testimony from these individuals. Defendant seeks this information because: (1) he believes the Government may seeks to introduce at trial evidence obtained from unindicted co-conspirators and/or confidential informants and he needs the information to rebut the evidence; and (2) he did not conduct the controlled buys in this matter, which were used to obtain the search warrant for the 722 9th Avenue residence, and therefore, disclosure is necessary for him to prepare a defense. (Doc. 48 at 1-2).

In response, the Government argues that the Motion should be denied because it is not required to produce the requested information under either the Federal Rules of Criminal Procedure or the Jencks Act, at least until after the witness testifies, and based upon the Government's analysis, the information sought by Defendant is not exculpatory evidence required to be disclosed pursuant to *Brady*. (Doc. 57 at 5). The Government also contends that Defendant cited no authority for his request and further claims no legal authority exists.

With respect to disclosure of the identities and contact information of any confidential informants, in *United States v. Jiles*, 658 F.2d 194 (3d Cir. 1981), the United States Court of

Appeals for the Third Circuit explained:

> In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), the Supreme Court recognized "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Id.* at 59, 77 S.Ct. at 627. It held, however, that this privilege is not without limitations. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61, 77 S.Ct. at 627-28 (footnote omitted).
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> While there is no fixed rule as to when disclosure is required, *McCray v. Illinois*, 386 U.S. 300, 311, 87 S.Ct. 1056, 1062, 18 L.Ed.2d 62 (1967), the Court in *Roviaro* stated that once a defendant sets forth a specific need for disclosure the court should balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62, 77 S.Ct. at 628. The result of the balancing will depend upon the particular circumstances of the case, "taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id. See* generally Westen, The Compulsory Process Clause, 73 Mich.L.Rev. 71, 161-66 (1974). *See also Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959).

Jiles, 658 F.2d at 196. The totality of Defendant's argument is that he believes the Government may seek to introduce at trial evidence obtained from confidential informants, he needs the information to rebut the evidence, and he did not conduct the controlled buys in this matter, which were used to obtain the search warrant for the 722 9th Avenue Residence, and therefore, disclosure is necessary for him to prepare a defense. Based upon said argument, the Court finds that Defendant's Motion offers nothing beyond mere speculation that any confidential informant has any information which may be helpful to a defense of his case, which does not meet the burden that Defendant set forth a specific need for disclosure.

Nor has Defendant established any entitlement to the identity and contact information of any unindicted co-conspirators or to early disclosure of any prior statements and/or testimony from unindicted co-conspirators or confidential informants. Accordingly, Defendant's "Motion

for Disclosure of All Prior Testimony/Statements of Unindicted Co-Conspirators and/or Confidential Informants and for Disclosure of the Identity and Contact Information of the Same," (Doc. 48), is denied without prejudice.

III. Defendant's "Motion to Preserve and Disclose Agents' Rough Notes" (Doc. 49)

Third is Defendant's "Motion to Preserve and Disclose Agents' Rough Notes." (Doc. 49). By this Motion, Defendant seeks an Order requiring all law enforcement officers who investigated the charges in this case to retain and preserve all rough notes and writings which are arguably producible to the defense pursuant to 18 U.S.C. § 3500, Federal Rule Criminal Procedure 26.2, and/or B*rady*, and to disclose said documents to the Court for the Court's review. *See United States v. Ramos*, 27 F.3d 65, 68-69 (3d Cir. 1994).

In response, counsel for the Government first states that he has instructed law enforcement personnel associated with the investigation of this case to retain their rough notes. Counsel further asserts that with respect to disclosure of the rough notes, to the extent that any of the rough notes contain *Brady/Giglio* material, the Government is required to, and will produce those rough notes to Defendant. Otherwise, while the notes are not discoverable, the Government will produce the rough notes to Defendant on January 10, 2019, at the same time it produces Jencks Act material as it is counsel for the Government's practice to do so.

Defendant's "Motion to Preserve and Disclose Agents' Rough Notes" (Doc. 49) is granted in part and denied in part. It is granted to the extent that law enforcement personnel associated with the investigation of this case are ordered to retain their rough notes. It is denied, as moot, to the extent that Defendant seeks disclosure of the rough notes to the Court in light of

the Government's agreement to produce the rough notes to Defendant on January 10, 2019.

IV. Defendant's "Motion to Produce Evidence Which the Government Intends to Use Under Federal Rules of Evidence 404(b) and 609 with Citation of Authority" (Doc. 50)

Fourth is Defendant's "Motion to Produce Evidence Which the Government Intends to Use Under Federal Rules of Evidence 404(b) and 609 with Citation of Authority." (Doc. 50). By this Motion, Defendant seeks an Order requiring the Government to set forth any and all prior bad acts and/or criminal convictions of Defendant which the Government would intends to use in its case-in chief, on cross examination, or rebuttal, and if necessary, requests that the Court hold a pretrial hearing on the admissibility of such evidence.

In response, with respect to Rule 609 evidence, the Government states that if Defendant were to testify, it would seek admission of Defendant's previous conviction, and that as it is unaware of other witnesses Defendant may call, it does not know whether any defense witnesses have convictions for which the Government would be required to provide notice pursuant to Rule 609. With respect to Rule 404(b) evidence, the Government asserts that if not as "direct evidence of the charges, because firearms are tools of the trade of drug traffickers," then under Rule 404(b), it will seek the admission of the firearm found concealed under the back porch of 722 9th Avenue. The Government also emphasizes that the Court already ordered the Government in its Amended Pretrial Order to provide Defendant with any Rule 404(b) evidence it intends to introduce at trial by January 10, 2019.

In light of the Government's response to Defendant's Motion, and this Court's Amended Pretrial Order wherein the Court ordered the Government to provide Defendant with "any

evidence of defendant's uncharged conduct which it intends to introduce at the trial pursuant to Federal Rule of Evidence 404(b), on or before **January 10, 2019**," (Doc. 38) (emphasis in original), "Defendant's Motion to Produce Evidence Which the Government Intends to Use Under Federal Rules of Evidence 404(b) and 609 with Citation of Authority," (Doc. 50), is denied as moot.[1]

V. Defendant's "Motion to Compel Government to Disclose the Identity of Any Expert Witness it Intends to Call at Trial and the Nature of the Expert Testimony" (Doc. 51)

Fifth is "Defendant's Motion to Compel Government to Disclose the Identity of Any Expert Witness it Intends to Call at Trial and the Nature of the Expert Testimony." (Doc. 51). Defendant seeks Order so that he can have the opportunity to rebut the Government's expert testimony.

In response, the Government states that it has provided Defendant with laboratory reports, it intends to call the forensic chemist who authored those reports as an expert witness, and it also intends to call Michael Warfield as an expert witness with regard to drug trafficking (the exact scope of said testimony to be further narrowed and developed during the course of trial preparation). The Government further asserts that it will have provided Defendant with its experts' reports and qualifications prior to January 10, 2019, because pursuant to the Court's Amended Pretrial Order the parties are to attempt to reach a stipulation with respect to expert qualifications and reports by January 10, 2019.

[1]If Defendant challenges the admissibility of any evidence the Government intends to introduce at trial, Defendant shall file an appropriate motion in limine consistent with the Court's Amended Pretrial Order.

Given the Government's disclosure of the identity of its experts and its intent to provide Defendant with its experts' qualifications and reports prior to January 10, 2019, "Defendant's Motion to Compel Government to Disclose the Identity of Any Expert Witness it Intends to Call at Trial and the Nature of the Expert Testimony," (Doc. 51), is denied without prejudice to reassert if the Government does not provide Defendant with the nature of the expert testimony prior to January 10, 2019.

VI. Defendant's "Motion to Compel Production of *Brady* Material" (Doc. 52)

Sixth is Defendant's "Motion to Compel Production of *Brady* Material." (Doc. 52). By way of this Motion, Defendant seeks an Order requiring the Government to disclose or otherwise provide Defendant with numerous items, materials, and other information that Defendant contends is favorable to Defendant. Counsel for the Government responds that: (1) *Brady* material was revealed at the detention hearing in the form of defense witnesses; (2) he does not know of any incremental *Brady* information to be disclosed at this time; (3) he acknowledges the Government's ongoing obligation to provide Defendant with *Brady* information as the Government becomes aware of it and will comply with its obligation; and (4) the Court's Amended Pretrial Order already requires *Brady* material be turned over to Defendant no later than January 10, 2019.

Again, in light of this Court's August 28, 2018, Amended Pretrial Order pursuant to which the Government is required to "provide defense counsel with copies of any *Brady/Giglio* impeachment materials not previously disclosed" no later than January 10, 2019, Defendant's "Motion to Compel Production of *Brady* Material," (Doc. 52), is denied as moot.

VII. Defendant's "Motion for Leave to Supplement/Amend Pre-Trial Motions." (Doc. 53)

Seventh is Defendant's "Motion for Leave to Supplement/Amend Pre-Trial Motions." (Doc. 53). By way of this Motion, Defendant seeks permission to file supplemental or additional pretrial motions within thirty days of receiving materials/documents which were not within his possession at the time the pending pretrial motions were filed. "Defendant's Motion for Leave to Supplement/Amend Pre-Trial Motions," (Doc. 53), is granted.

VIII. Defendant's "Motion [to] Suppress Evidence under Fed.R.Crim. 12(b)(3) and Request for Franks Hearing" pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978)" (Doc. 54)

Eighth is Defendant's "Motion [to] Suppress Evidence under Fed.R.Crim. 12(b)(3) and Request for Franks Hearing" pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978)" ("Defendant's Motion to Suppress and Request for a *Franks* Hearing") (Doc. 54). The residence at 722 9th Avenue, Beaver Falls, Pennsylvania ("the 722 9th Avenue Residence") was searched pursuant to a search warrant that was supported by an Affidavit of probable cause submitted by Affiant New Brighton Police Officer and Pennsylvania Attorney General Task Force Officer Stephen Kelch ("Officer Kelch"). Defendant was present when the 722 9th Avenue Residence was searched. Drugs, a firearm, and a large amount of United States currency were seized from the residence. Defendant moves to suppress all items seized during the search.

In this Motion, Defendant asserts that he is eligible for a *Franks* hearing because the Affidavit of probable cause in support of the search warrant for the search of the 722 9th Avenue

Residence contains the following false statements of fact and/or omitted/contradictory items of information:

a. The search warrant contains a police incident number (BN6001217) which also appears on another unrelated police complaint of Jeremiah Collington. Additionally, a second version of the same search warrant contains the same police incident number, but which appears to be have been whited out and handwritten in with no initials assenting to the change.

b. In paragraph 6 of the Affidavit, it alleges the Defendant utilized the address of 722 9th Ave., Beaver Falls, PA on his PA driver's license and which was the registered address for Defendant with PA Board of Probation and Parole. While the Defendant does aver to staying at the address in question, the Affidavit is false as the driver's license confiscated during the search evidences an address of 1711 5th Ave., Beaver Falls, PA 15010. Defendant further purports his "registered" address with probation and parole was 1115 6th Ave., Beaver Falls, PA.

c. In paragraph 8, referencing the alleged control buy of August 3, 2017, the Affidavit states that through an alleged conversation between the CI and the target, "it was determined that the two would meet in the area of the 400 block of 9th Ave. in Beaver Falls." However, the investigative reports state that the CI asked the target where to meet, and the text records evidence that the CI directed the target to the 400 block of 9th Ave. (Save-A-Lot). Additionally, the text records do not evidence a determination for actually meeting, leaving off with a text of "Where u at".

    i. Further the investigative reports state that at 13:47, TFO Kelch (Affiant) observed the Defendant walk out of the residence of 722 9th Ave., Beaver Falls, PA and walk over to a grey Ford F-150 and get in. However, two minutes later he is at another location providing the CI with pre-recorded currency, and then two minutes later is providing surveillance at the 400 block of 9th Ave. when the CI arrives. Finally, four minutes after that the Affiant is several blocks away and observes the Defendant leaving the 722 9th Ave., Beaver Falls, PA residence.

    ii. The investigative reports state the CI arrived at the 400 block of 9th Ave. and TFO Montagazzi and various other law enforcement provided surveillance. However, the Affidavit states that TFO Montagazzi and TFO Ivan dropped the CI off at that location.

    iii. Further, it should be noted the word "grey" is spelled differently between the investigative reports and Affidavit, all of which were allegedly prepared by the same law enforcement officer.

iv. The investigative report states the CI walks up to the vehicle, allegedly driven by Defendant; however, the Affidavit states that the Defendant allegedly drives up to the CI.

v. The Affidavit states that at the de-brief, the CI stated that after he was dropped off, the CI called the target to inform him he was there. However, the call records do not support this contention. In fact the text message evidence does not even establish the date the texts were to have occurred.

vi. Further, in the Affidavit it states that during the de-brief the CI indicated he/she was dropped off and called the target to let him know he/she was there, a call which is not evidenced in the investigative reports. Thereafter, the Defendant allegedly arrived and the CI got inside the vehicle and allegedly handed the Defendant the prerecorded money and was then given the alleged heroin. However, in the investigative reports it is alleged that at the de-briefing, the CI indicated the opposite, thus being provided with the heroin and then handed over the prerecorded money.

vii. Further, the Affidavit and Investigative Reports contradict who the CI gave the alleged heroin to after the transaction.

d. In paragraph 9 of the Affidavit, with respect to the August 28, 2017 alleged control buy, it is alleged that the CI was dropped off at the 1000 block of 7th Ave. in Beaver Falls and walked toward the residence. Prior to arriving at the residence Defendant allegedly appears on 8th Street. However, the investigative report states that the CI is dropped off in the area and is watched standing on the corner of 8th Street where he eventually allegedly meets the Defendant and an alleged hand to hand transaction takes place. Further, according to the investigative report, the CI allegedly makes the controlled buy, referenced in the Affidavit, within only three (3) minutes of being dropped off and returning to the affiant's vehicle. It is purported that per the Affidavit, if the CI was dropped off at the 1000 block of 7th Ave., walked toward the house, met up with the Defendant, and returned to the affiant, that such a sequence of events given the area would take longer than three (3) minutes.

e. Further, in paragraph 10, it is alleged in the Affidavit that the affiant conducted the field tests on the controlled purchases and both tested positive for heroin. However, recently returned lab reports evidence the alleged narcotics did not test positive for heroin, with the narcotics alleged in the August 3, 2017 controlled buy testing positive for fentanyl and the narcotics alleged in the August 28, 2017 controlled buy, not testing positive for any controlled substance.

(Doc. 54 at 2-5) (citations omitted). Defendant argues that if these allegedly false statements are excised from the Affidavit of probable cause, then no legally sufficient probable cause would exist to support the issuance of the search warrant. (*Id.* at 5). Nor does the "good faith" exception save the search warrant, Defendant asserts, because the issuing authority was misled by the false information contained in and/or omitted from the warrant. (*Id.* at 6). The factual support for Defendant's legal argument of entitlement to a *Franks* hearing are the numerous exhibits attached to his Motion. (*See* Doc. 54-1 through 54-8).

A defendant's entitlement to a *Franks* hearing was recently addressed by Chief Judge Hornak of this Court in *United States v. Richardson*, Crim. No. 16-139, 2018 WL 4043155 (W.D. Pa. Aug. 24, 2018):

> A *Franks* hearing to challenge a search warrant affidavit may only be granted if a defendant makes a "substantial preliminary showing" that (1) "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and (2) "the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155–56. "If the defendant makes the requisite substantial showing for a *Franks* hearing and then, at that hearing, shows by a preponderance of the evidence that material statements in the affidavit are either recklessly or intentionally untruthful, the fruits of the search must be excluded unless the remaining content of the warrant is sufficient to establish probable cause." *United States v. Brown*, 3 F.3d 673, 676 (3d Cir. 1993). Put differently, even if the affiant made a false statement, the statement must be necessary to a finding of probable cause in order for a hearing to occur and evidence to be suppressed. *See United States v. Shields*, 458 F.3d 269, 276 (3d Cir. 2006). Moreover, "[a]llegations of negligence or innocent mistake are insufficient,"
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> *Franks*, 438 U.S. at 171, and the law does not require "elaborate specificity ... in this area." *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

Richardson, 2018 WL 4043155, at *3.

While Defendant argues that he has presented in his motion and multiple exhibits, "numerous portions of the warrant affidavit that are false and which were clearly made knowingly, intentionally, and/or with reckless disregard for the truth by the Affiant," the Court disagrees. (Doc. 55 at 5). As referenced by Defendant, there are subtle factual differences between the Investigative Reports and other exhibits attached to Defendant's Motion to Suppress and Request for *Franks* Hearing and the factual allegations contained within the Affidavit. The variations, however, do not establish, as Defendant contends, that Officer Kelch knowingly, intentionally, or with reckless disregard for the truth, included material false statements in the Affidavit. Defendant has not, therefore, met the requisite substantial showing that Officer Kelch knowingly, intentionally, or with reckless disregard for the truth, included material false statements in the Affidavit, and Defendant is not entitled to a *Franks* hearing.

Defendant also argues that all of the evidence seized at the search of the 722 9th Avenue Residence must be suppressed because the search warrant upon which the search of the 722 9th Avenue Residence was based was invalid on its face and therefore, violated Defendant's rights under the Fourth Amendment. In particular, Defendant asserts that search warrant was invalid on its face because it: (1) was not signed on the first page by the Affiant, Officer Kelch; (2) did not contain a time-stamp and/or seal; (3) the date was incomplete as to the issuing authority; (4) was not completed as to when and to whom the search warrant should be returned; (5) did not incorporate the Affidavit of probable cause; (6) was patently overbroad by failing to state with particularity the places to be searched and the items to be seized; and (7) had what appeared to be a changed/whited out Police Incident Number (the same number used in an unrelated case), which did not show any initials evidencing consent to the change. (*Id.*).

Initially, the Court disagrees with Defendant that the search warrant was patently overbroad. To the contrary, the search warrant stated with sufficient particularity the places to be searched and the evidence to be seized. *See* Doc. No. 54-1 at 1, 9-10. The Court further finds, contrary to Defendant's argument, that the search warrant incorporated the Affidavit of probable cause. *See Id.* at 1-12.

Defendant's remaining arguments all concern technical errors. Technical errors do not automatically make a search warrant invalid and result in a Fourth Amendment constitutional violation. *See U.S. v. Jackson*, 617 F.Supp.2d 316, 320 (M.D. Pa. 2008). "To hold otherwise would elevate form over substance and allow inadvertent, procedural errors to vitiate substantively valid warrants." *Id*. The Fourth Amendment dictates that a warrant shall not "issue" unless it is supported by probable cause. Thus, the question is whether the issuing authority found probable cause and approved the search warrant. Here, it is abundantly clear that the issuing authority, local Magistrate John W. Armour found probable cause to believe that drugs would be found at the 722 9th Avenue Residence and thus, approved the search warrant at issue herein. Accordingly, the Court finds that the technical errors cited by Defendant did not render the search warrant invalid and did not result in a violation of Defendant's rights under the Fourth Amendment.

For all these reasons, Defendant's "Motion [to] Suppress Evidence under Fed.R.Crim. 12(b)(3) and Request for Franks Hearing" pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978)," (Doc. 54), is denied.

SO, ORDERED this 18th day of December, 2018.

s/Arthur J. Schwab
Arthur J. Schwab
United States District Judge

cc: All ECF Registered Counsel of Record